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No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STEVEN LEVINE,
Petitioner,
v.
NATHAN S. HEFFERNAN *et alia*,
Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER *and* BRIEF *AMICUS CURIAE*

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Pursuant to Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioner. Respondent Wisconsin State Bar has refused consent for the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide

free legal assistance to individual employees who, as a consequence of their subjection to compulsory-unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States.

To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from paying, in whole or in part, compulsory dues and fees to labor organizations, including *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis* v. *BRAC*, 466 U.S. 435 (1984); and *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986).

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Court of Appeals could seriously undermine the constitutional rights of nonunion employees heretofore established in *Abood*, *Ellis*, and *Hudson* with respect to the standard for judicial review of arrangements mandating compulsory payments by those employees to labor organizations.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Foundation recognizes that petitioner has ably argued his own, personal interests in having this Court issue a writ of certiorari. Yet, by naturally focussing on his particular circumstances as they relate to the context of an integrated bar in a single State, petitioner may not have sufficiently emphasized the general, nationwide importance of the Court of Appeals' decision as it relates, or could be applied, to other compulsory-dues arrangements, especially in the labor-relations context.

Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the significance of the Court of Appeals' ruling, and of the pressing need for this Court's review thereof by writ of certiorari.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

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INTRODUCTION

Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation submits this brief *amicus curiae* in support of petitioner.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

The crucial thesis of the Court of Appeals' decision—that a governmentally imposed arrangement mandating the payment to a private organization by dissenting individuals of "*mere* compulsory dues" is *not* subject to strict scrutiny under the First Amendment—flies in the face of every relevant precedent of this Court. Moreover, unless reversed, this aberrant thesis not only will immediately create an unjustifiable exception for one State's integrated bar within the long-settled First-Amendment law controlling the exaction of compulsory dues established by these precedents, but also will serve as an excuse for lower courts to disregard or even affirmatively to eviscerate the substantive and procedural constitutional protections those precedents have guaranteed nationwide in the public and private labor-relations contexts.

ARGUMENT

The importance of this Court's review of the Court of Appeals' decision lies in that court's unprecedented ruling that abridgment of individuals' First-Amendment freedom of association by a "*mere* compulsory dues requiremen[t]" need *not* be subject to the so-called "compelling-state-interest test" because, supposedly,

> 1. *Lathrop* v. *Donahue*[1] so held in the specific context of the integrated bar;
>
> 2. this Court's statements in *Abood* v. *Detroit Board of Education*[2] and *Ellis* v. *BRAC*[3] that "compulsory contribution requirements are significant

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[1] 367 U.S. 820 (1961).

[2] 431 U.S. 209 (1977).

[3] 466 U.S. 435 (1984).

infringements on first amendment rights * * * are *dicta*", and in any event those decisions "did not address the issue decided by *Lathrop*"; and

3. *Lathrop* upheld an integrated bar with a "multi-faceted character" "not limited to activities in the areas of continuing legal education and attorney discipline".[4]

Unless reversed by this Court, these misinterpretations of *Lathrop*, *Abood*, *Ellis*, and (by implication) *Chicago Teachers Union* v. *Hudson*[5] will immediately derange the long-settled First-Amendment law controlling the exaction of compulsory dues and fees in the Seventh Circuit, and serve as an excuse for courts elsewhere to disregard or even affirmatively to eviscerate the substantive and procedural constitutional protections established from *Abood* through *Hudson*.

I. According to the Court of Appeals, the government may require dissenting private individuals to pay private organizations "*mere* compulsory dues" without heightened First-Amendment scrutiny, provided that everyone keeps carefully silent about the purposes to which the organizations intend to apply the dues-payments.

As an excuse for denying petitioner relief, the Court of Appeals claimed that neither *Lathrop*, nor any other decision of this Court, "has applied a compelling state interest test in analyzing *mere* compulsory dues requirements", and that *Lathrop* had in fact sustained such a "*mere* dues" requirement under a "deferential standard of

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[4] Levine v. Heffernan, 864 F.2d 457, 461, 462 (7th Cir. 1988).

[5] 475 U.S. 292 (1986).

review".[6] By a "*mere* compulsory dues requiremen[t]", the court meant a "requiremen[t]" completely dissociated from "the issue of whether [those] compulsory dues payments [are] used to fund *certain activities*".[7] Thus, the court read *Lathrop* as implying that traditionally strict First-Amendment scrutiny applies in *inverse* proportion to the level of knowledge available about the use of the exacted monies: the *less* known, the *less* the constitutional concern! Nothing could be further from the truth.

A. Logically, a court faced with a "*mere* compulsory dues requirement", abstracted from the ultimate use of the money by the *private* organization claiming it, would be unable to assess what specifically *governmental* interest (be it "rational", "compelling", or whatever) justified the taking. The "*mere* compulsory dues requirement", therefore, would be indistinguishable from an unfettered delegation to private parties of a naked power to tax, which is undoubtedly unconstitutional *per se*.[8] So, contrary to the Court of Appeals, the very *"mereness"* of a compulsory-dues requirement constitutionally *condemns*, not sanctifies, it.

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[6] 864 F.2d at 462, 461.

[7] *Id.* at 462 (emphasis supplied).

[8] *See* Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-64 (1874); Cole v. City of La Grange, 113 U.S. 1, 6-7 (1885); City of Parkersburg v. Brown, 106 U.S. 487, 500-01 (1882).

See also National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-42 (1974); FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162-65 (1980); Union Brokerage Co. v. Jensen, 322 U.S. 202, 210-11 (1944); New Mexico *ex rel.* E.J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38, 55 (1906); Morgan's Steamship Co. v. Louisiana Board of Health, 118 U.S. 455, 461-62 (1886).

B. Moreover, *Lathrop* upheld no abstract "*mere* dues" exaction. Rather, in passing on the constitutionality of Wisconsin's integrated bar as it then existed, the plurality explicitly emphasized that "[a] review of the *activities* of the State Bar authorized under the Rules and Bylaws is *necessary to decision*"; carefully examined those activities and the governmental interests they supposedly served; and concluded that

> the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession *in this fashion* should be shared by the subjects *and beneficiaries* of the regulatory program * * * .[9]

C. Furthermore, the *Lathrop* plurality explicitly likened the issue of compulsory subsidization of the integrated bar to the "question of compelled financial support of group activities"[10] decided in the labor context in *Railway Employes' Department* v. *Hanson*.[11] And *Hanson*, of course, was careful to explain that "[t]he financial support required relates * * * to the work of the union in the realm of collective bargaining", and to hold "only * * * that the requirement of financial support of the collective-bargaining agency by all who receive the benefits of its work * * * does not violate * * * the First * * * Amendmen[t]".[12] In as much as *Hanson* noted that "unions have broad powers to levy assessments for *unspecified* purposes", in the course of warning that

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[9] 367 U.S. at 828, 828-33, 843 (Brennan, J.) (emphasis supplied).

[10] *Id.* at 828.

[11] 351 U.S. 225 (1956).

[12] *Id.* at 235, 238.

"'assessments' * * * imposed for purposes not germane to collective bargaining" would pose "a *different* [constitutional] problem",[13] *Hanson* clearly sustained *no* "*mere* compulsory dues requirement". And in as much as *Lathrop* addressed the same issue (albeit in a different setting), *Lathrop* upheld no such exaction either.

In short, the Court of Appeals' notion of the constitutional sacrosanctity of "*mere* compulsory dues requirements" is meritless.

II. According to the Court of Appeals, *Lathrop* v. *Donahue* is unrelated in terms of its constitutional standard of review to *Abood* v. *Detroit Board of Education* and *Ellis* v. *BRAC*, although all three cases explicitly rely on *Railway Employes' Department* v. *Hanson* as controlling precedent.

The Court of Appeals demanded "evidence that the Supreme Court has applied a compelling state interest test in analyzing *mere* compulsory dues requirements".[14]

A. The short and decisive rejoinder is that a compelling-state-interest test could *never* be used to analyze a "*mere* compulsory dues requirement", because such a requirement by hypothesis provides *no* information on the specific private *activities* the dues are meant to subsidize, although that information is indispensable for determining whether the compulsory exactions advance a sufficiently important governmental purpose to be constitutional. For that reason, a "*mere* compulsory dues requirement" must *always* be unconstitutional *per se* even under the so-called "rational-basis" test—for if the activities of

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[13] *Id.* at 235 (emphasis supplied).

[14] 864 F.2d at 461.

the dues-collecting private organization remain unknown, so too does the *legitimate* governmental reason for licensing the exactions (the bare delegation of a power to tax being palpably invalid, as noted above).

B. The longer, but equally devastating, response to the Court of Appeals' demand is that this Court *has* required defined "compulsory dues requirements" to satisfy a strict standard of review in every case in which the issue arose. As a matter of First-Amendment principle, though, the matter should hardly be controversial: Compelled contributions to a private organization impose on the unwilling contributors forced *association* with the members of that organization (whatever their specific activities) and forced *speech* if the organization engages in public advocacy. So much should be clear from, for example, *Buckley* v. *Valeo*[15]. The Court of Appeals, however, openly dismissed *Buckley* as "provid[ing] minimal guidance in cases not involving core first amendment values".[16] The Court of Appeals did not explain, though, why the freedom not to associate with an integrated bar is other than a "core first amendment valu[e]".

C. More specifically, the Court of Appeals woefully misread *Abood* and *Ellis* when it described as *"dicta"* statements in those cases "that compulsory contribution requirements are significant infringements on first amendment rights".[17] Directly at issue in *Abood*, for instance, was whether nonunion employees could be required to pay a fee to a union to defray its costs of collective bar-

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[15] 424 U.S. 1, 22-23 (1976).

[16] 864 F.2d at 462.

[17] *Id.*

gaining on their behalf. Holding the compulsory-dues requirement valid, this Court stated that

> [t]o compel employees financially to support their collective-bargaining representative *has an impact upon their First Amendment interests.* * * * To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's *freedom to associate* for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* * * * is that such interference as exists is constitutionally justified by the legislative assessment of the *important* contribution of the union shop to the system of labor relations * * * .[18]

Similarly, *Ellis* noted that, "by allowing the [forced contributions of the] union shop at all, we have already countenanced a *significant impingement on First Amendment rights*"; but "[i]t has long been settled that such *interference with First Amendment rights* is justified by the *governmental interest* in industrial peace".[19]

Abood and *Ellis* both rested explicitly on *Hanson*—reading *Hanson* as a case that had upheld against First-Amendment challenge a compulsory-dues requirement, on the ground that that requirement subserved an "important" governmental interest. But *Lathrop*, too, relied explicitly on *Hanson*, explaining that the issue of the integrated bar "presents a claim of impingement upon freedom of association *no different* from that which we decided in * * * *Hanson*".[20] Therefore, con-

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[18] 431 U.S. at 222 (footnote omitted) (emphasis supplied).

[19] 466 U.S. at 455-56 (emphasis supplied), *citing* Hanson, 351 U.S. at 238.

[20] 367 U.S. at 842 (emphasis supplied).

trary to the view of the Court of Appeals, *Lathrop* must have utilized the *selfsame* governmental-interest constitutional standard as *Hanson*, *Abood*, and *Ellis*.[21]

This, however, still does not support the Court of Appeals' decision, because the *activities* of Wisconsin's integrated bar have substantially changed since *Lathrop*.

III. According to the Court of Appeals, the constitutional justification for a governmentally mandated payment of dues by a private individual to a private organization need not rest on strict factual scrutiny of the organization's present-day activities.

Even if *Lathrop* did employ a form of strict First-Amendment scrutiny to the integrated bar as it existed in 1961, it cannot be a binding precedent today if the specific activities that justified the compulsory exactions then are absent now.

A. The Court of Appeals stated that the activities which the *Lathrop* plurality found to

> serv[e] a legitimate state interest * * * included but were not limited to activities in the areas of continuing legal education and attorney discipline. The Court, however, did not place any special emphasis on these activities. In fact, the plurality opinion, in justifying its decision, expressly noted the multifaceted character of the Wisconsin bar. 367 U.S. at 842.[22]

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[21] A possible alternative explanation more in keeping with the reasoning of the Court of Appeals is that *Lathrop misapplied Hanson*: that is, although *Hanson* employed an "important-governmental-interest" test, the *Lathrop* plurality misread *Hanson* as employing a rational-basis standard. This explanation, however, would imply that *Lathrop* has been overruled by *Abood* and *Ellis* as to the meaning of *Hanson*, and therefore is no usable precedent at all.

[22] 864 F.2d at 462.

This description is inaccurate. The *Lathrop* plurality catalogued numerous activities of the integrated bar besides "continuing legal education and attorney discipline" only in order to meet Lathrop's argument that, "because of its legislative activities, the State Bar partakes of the character of a political party", by showing that "on their face the purposes and the designated activities of the State Bar hardly justify this characterization".[23] The plurality was concerned with proving that "legislative activity is not the major activity of the State Bar", and that "[t]he activities without apparent political coloration are many".[24] That is, showing "the multifaceted character" of the integrated bar established that it was not an exclusively or primarily legislative enterprise, and thereby defeated Lathrop's claim that the compulsory-dues requirement was unconstitutional *per se* because it compelled his association with an *inherently political* private organization.

On the issue of whether compulsory dues could be extracted for the non-legislative activities of the bar, however, the *Lathrop* plurality held that

> [b]oth in purport and practice the bulk of the State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State * * * . It cannot be denied that *this* is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, *in order to further the State's legitimate interests in raising the quality of professional services*, may con-

[23] 367 U.S. at 833.

[24] *Id.* at 839.

> stitutionally require that the costs of improving the profession *in this fashion* should be shared by * * * the lawyers * * * .[25]

Thus, the constitutionality of the compulsory-dues requirement turned on "the bulk" of the integrated bar's activities in the areas of "educational and ethical standards", *not* on its other "multifaceted" activities. And the holding of the *Lathrop* plurality was carefully confined to "the character of the integrated bar shown on this record".[26]

In this case, the District Court specifically found that that "character" had dramatically changed from 1961 to 1988, and that "[i]t is no longer the case that [compulsory] dues support the activities that gave the Bar its * * * character in *Lathrop*".[27] The Court of Appeals did not impugn this finding as clearly erroneous. Rather, it simply *ignored* the radical transformation in the character of the integrated bar, on the airy theory that the District Court had "overemphasized the importance of the bar's role in the areas of continuing legal education and attorney discipline to the *Lathrop* Court".[28] This approach woefully misunderstands *Lathrop*.

B. An additional demerit is that the Court of Appeals' lack of concern about the historical changes in the integrated bar disregards the strict admonition of constitutional jurisprudence that "factual concreteness" is the *sine qua non* for addressing First-Amendment issues.[29]

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[25] *Id.* at 843 (footnote omitted) (emphasis supplied).

[26] *Id.*

[27] Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478, 1492-93 (W.D. Wis. 1988).

[28] 864 F.2d at 462.

[29] *E.g.*, Abood, 431 U.S. at 236-37.

CONCLUSION

The Court of Appeals' decision is a *pastiche* of errors that thoroughly muddies the waters heretofore largely clarified by *Hanson*, *Abood*, *Ellis*, and *Lathrop* too (if intelligently read in light of those other opinions). If allowed to stand, what the Court of Appeals has done and said will engender confusion, undermine the stability of this Court's precedents, and stimulate needless litigation over issues that—up to now—this Court had settled with seeming permanence.

For these reasons, the petition should be granted.

Respectfully submitted,

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